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From: CN=Tom Hagler/OU=R9/O=USEPA/C=US
Sent: Mon 4/30/2012 8:52:31 PM
Subject: RE: BDCP: Draft Corps letter to DWR on Purpose (UNCLASSIFIED)

I'll try to keep this short. It's a little challenging to coordinate our EPA thoughts with Erin now kicked out of her building, sans computer, from some bomb threat or whatever. So pardon any repetition here.

The sentence that is giving us heartburn is this one:

"Because each individual BDCP project functions as an integrated component of the plan, the overall purpose statement for each of these individual projects will reflect that the project must be consistent with the BDCP so that the range of alternatives analyzed under 404(b)(1) would be limited to only those which would be within the scope of activities and operations authorized by the finalized BDCP (the final Habitat Conservation Plan as approved by U.S. Fish and Wildlife Service and the National Marine Fisheries Service.)."

Keeping in mind that the BDCP is an HCP with a single final conveyance proposal, what this sentence is saying is that any conveyance project decision under an HCP would automatically be the LEDPA. Obviously not true.

I think we all agree that any LEDPA would have to be permitable under the ESA. But the HCP conveyance project needs to comply with both ESA and the 404(b)(1) guidelines. Although similar, the requirements of those two Acts are not identical. And unless the project proponent takes affirmative steps to make sure that the chosen HCP is also the LEDPA (by showing compliance with the 404(b)(1) guidelines somewhere in this process), then you don't have any record for showing compliance with 404.

You know all of that. The trickier part is your comment to Karen:

"The message here is that we are not going to make them look at alternatives that outside of or not otherwise covered under the BDCP (i.e., such alternatives would not be practicable under the 404(b)(1)s)."

Again this, seems to suggest that ESA decisions (does a particular HCP proposal merit an HCP permit?) somehow trump 404. And it doesn't. So your comment is correct only if the BDCP has explicitly assured that the BDCP (and the BDCP EIS) includes the LEDPA. And you can't assume that "up front."

What all this shows is that you really need to do 404 and ESA simultaneously, so that one informs the other. So that you have a record indicating that the specific HCP decision did not impermissibly eliminate the LEDPA.

I don't really know how to revise your intended sentence in your letter, because we haven't been party to the recent discussions. I was fine with your last letter, but I understand that DWR didn't like it.

We should probably take a little time to get this one right.

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